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DATO' SHAZRYL ESKAY ABDULLAH

v.

MERONG MAHAWANGSA SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MOHTARUDIN BAKI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02-1438-2011]

C

5 SEPTEMBER 2013

CONTRACT: *Interpretation - Intention of contracting parties - Commercial contract - Principles of - Failure to pay agreed sum - Claim for - Words employed in letter of undertaking - Whether referred to award*

D *of project as opposed to project itself - Whether termination of project affected sum payable to appellant*

The respondent had requested the appellant to lobby and procure a project known as 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' ('bridge project'). The request was embodied in a letter of undertaking dated 3 July 1998 with the terms, that: (i) the respondent had been awarded with the bridge project by the Government on 25 June 1998 through the service of the appellant; (ii) the respondent undertook and agreed to pay the appellant a sum of RM20,000,000 on or before 3 November 1998 being agreed remuneration payable; and (iii) the undertaking shall remain valid so long as the award for the project remained valid and subsisting. The appellant succeeded in obtaining the bridge project for the respondent. The bridge project later evolved into what was known as 'the Crooked Bridge Project' and in 2006, the Government terminated the project. The appellant, however, failed to secure the payment of RM20,000,000 as set out in the letter of undertaking and thus, filed a suit in the High Court. The trial judge dismissed the appellant's claim and held, *inter alia,* that the said claim was incompetent under the letter of undertaking as the bridge project had been terminated by the Government. Hence, this appeal.

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Held (allowing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The words employed in the letter of undertaking referred to the award of the project as opposed to the project itself. Clause 4 specifically states that the letter of undertaking shall remain valid as long as the award for the project remained valid and subsisting. There was a world of difference between the award of the project and the project itself. The parties never intended to refer to the project itself. If they did, they would not have specified the payment date, *ie,* four months from the date of the letter of undertaking. In any event, if their intention was to refer to the project itself, then that could have been achieved by employment of the words that "this letter of undertaking shall become invalid if and when the project is terminated for whatever reasons". (paras 14 & 16)

(2) It is trite law that the court cannot re-write contracts. Further, commercial contracts of such magnitude would only be entered into by parties after seeking the best legal and commercial advices. It is thus always the policy of the courts to enforce such agreements to ensure stability and certainty in the trade and commerce in the country. (para 17)

(3) The judge erred in his deliberation when he took into account of the 2006 termination of the project by the Government bearing in mind that the letter of undertaking was dated 3 July 1998, the appellant's cause of action commenced on 3 November 1998 (payment date) and the date of the claim was 7 July 2002. Had the trial of the case commenced and concluded prior to 2006, the judge could not have taken into consideration of the 2006 termination in his deliberation. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah meminta perayu untuk mendapatkan satu projek yang dikenali sebagai 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' ('projek jambatan'). Permintaan ini termaktub dalam surat akujanji bertarikh 3 Julai 1998 dengan terma-terma bahawa (i) responden telah diawardkan dengan projek jambatan oleh Kerajaan pada 25 Jun 1998 melalui usaha perayu; (ii) responden mengakujanji dan bersetuju untuk membayar perayu jumlah sebanyak RM20,000,000 pada atau sebelum 3 November

A 1998 sebagai ganjaran yang dipersetujui; dan (iii) akujanji akan kekal sah selagi award untuk projek masih sah dan wujud. Perayu berjaya memperolehi projek jambatan tersebut bagi responden. Projek jambatan tersebut kemudian bertukar kepada apa yang dikenali sebagai 'the Crooked Bridge Project' dan pada tahun
B 2006, Kerajaan telah menamatkan projek tersebut. Perayu, walau bagaimanapun, gagal untuk memperolehi bayaran RM20,000,000 seperti yang termaktub dalam surat akujanji dan oleh itu, memfailkan tindakan di Mahkamah Tinggi. Hakim bicara menolak tuntutan perayu dan memutuskan, antara lain, bahawa tuntutan
C tersebut adalah tidak kompeten di bawah surat akujanji memandangkan projek jambatan telah ditamatkan oleh Kerajaan. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)

D **Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:**

(1) Perkataan-perkataan yang digunakan dalam surat akujanji merujuk kepada award bagi projek dan bukannya projek itu sendiri. Klausa 4 secara spesifik memperuntukkan bahawa surat
E akujanji akan kekal sah selagi award bagi projek kekal sah dan wujud. Terdapat perbezaan antara award bagi projek dan projek itu sendiri. Pihak-pihak tidak berniat untuk merujuk kepada projek itu. Jika mereka berniat sedemikian, mereka tidak
F akan menyatakan tarikh bayaran, iaitu empat bulan dari tarikh surat akujanji. Dalam apa jua keadaan, jika niat mereka adalah untuk merujuk kepada projek itu, maka ia boleh dicapai melalui penggunaan perkataan "surat akujanji menjadi tidak sah jika dan apabila projek ini ditamatkan untuk sebarang sebab".

G **(2)** Adalah undang-undang mantap bahawa mahkamah tidak boleh menulis semula kontrak. Tambahan lagi, kontrak-kontrak komersial dengan magnitud sebegitu hanya boleh dimeterai oleh pihak-pihak selepas mendapatkan nasihat undang-undang dan komersial yang terbaik. Maka, adalah polisi mahkamah untuk
H melaksanakan perjanjian-perjanjian sebegitu untuk mengekalkan stabiliti dan kepastian dalam perdagangan negara.

(3) Hakim telah terkhilaf dalam pertimbangannya apabila mengambilkira penamatan projek pada tahun 2006 oleh
I Kerajaan memandangkan surat akujanji adalah bertarikh 3 Julai 1998, kausa tindakan perayu bermula pada 3 November 1998 (tarikh bayaran) dan tarikh tuntutan adalah pada 7 Julai 2002.

Jika perbicaraan kes dimulakan dan diputuskan sebelum 2006, yang arif hakim tidak mungkin dapat mempertimbangkan penamatan tahun 2006 dalam pertimbangannya.

Case(s) referred to:

Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(refd)***

Wickman Tools v. Schuler AG [1974] AC 235 ***(refd)***

For the appellant - CV Prabhakaran (AB Teoh & Michael Teoh with him); M/s AB Teoh & Shariza

For the respondent - Stanley KW Chang (CH Loh with him); M/s Stanley Chang & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: S6(5)-22-16-02]

Reported by Kumitha Abd Majid

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This appeal is against the decision of the High Court after a full trial where the learned judge dismissed the appellant's claim of RM20,000,000 for services rendered as set out in a letter of undertaking dated 3 July 1998.

[2] We heard the appeal and after giving due consideration to respective submissions, we allowed the appeal and now give our reasons.

Background Facts

[3] Though the case went for a full trial, the factual matrix in our view is largely undisputed and quite straight forward and they are these. The appellant was requested by the respondent to lobby and procure the project known as "Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan" (Bridge Project) for a consideration.

[4] This request is embodied in a letter of undertaking addressed to the appellant, the contents of which read as follows:

WHEREAS the Procuror has at our request agreed to render his services for the purpose of procuring and securing from the Government of Malaysia the award of the project known as

"Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan" of 3 Jalan 222, 46000 Petaling Jaya (Company Registration No 452586-U) (hereinafter called the "Consortium") of which we have a 60% equity participation in the issued share capital.

WHEREAS through the Procuror's services aforesaid the Unit Perancang Ekonomi Jabatan Perdana Menteri by letter dated 25 June 1998 has awarded in principle the project to the Consortium.

In consideration of the services aforesaid rendered by the Procuror we Merong Mahawangsa Sdn Bhd (Company Registration No 463227-X) a Company incorporated in Malaysia and having its registered address at No 3374, Jalan 18/31, Taman Sri Serdang, 4330 Seri Kembangan, Selangor Darul Ehsan hereby undertakes and agrees to pay you the sum of Ringgit Malaysia Twenty Million only (RM20,000,000.00) being agreed remuneration payable on or before the 3rd November 1998.

This Undertaking shall remain valid so long as the award for the project remains valid and subsisting and should the award be withdrawn and/or terminated for any reasons whatsoever the aforesaid sum of RM20,000,000.00 or any part thereof shall be refunded without interest immediately.

Dated this 3rd day July 1998.

[5] It is undisputed that the appellant had succeeded in obtaining the Bridge Project for the respondent and in view of the failure of payment of RM20,000,000 by the respondent, the appellant filed this suit.

[6] The Bridge Project was later evolved into what is now known as 'the Crooked Bridge Project' which the government terminated the construction of the same. And there is no appeal against the finding of fact by the learned judge that the fact that the Bridge Project had evolved into a Crooked Bridge Project and there is a sufficient link between the two which still entitles the appellant to claim under the letter of undertaking.

High Court Decision

[7] The learned judge's grounds in brief concerned two main issues which are as follows:

(a) Whether the evolving of the Bridge Project into a Crooked Bridge Project renders the appellant's claim incompetent under the letter of undertaking?

(b) Whether the termination of the Crooked Bridge Project renders the appellant's claim under the letter of undertaking incompetent?

[8] In respect of the first issue, the learned judge had this to say:

> The Defendants have taken pains to show that the bridge in both the projects were very different as shown in the comparison table in paragraph 12 of their outline submission (Enclosure 105). The Defendants' contention that the award given to Gerbang Perdana Sdn Bhd for the construction of the said GSB project on a turnkey basis is not the same project as the original bridge project for which the Plaintiff had rendered his services cannot be accepted by this Court. This Court finds that the original bridge project which was to be constructed under the SIG Project on privatisation basis (Exhibit P-26) has nexus to the said GSB Project on a design and built turnkey basis (Exhibit D-27) and the parties in both the projects for which the services was rendered by the Plaintiff are closely connected to each other project. In fact, there is every reason for assimilating the causal link between the SIG Project and the GSB Project and is a reasonable reliance and inherent reliance ...
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> ...
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> The Plaintiff's evidence (PW-3), his witness (PW-1) and the second Defendant (DW-3)'s testimony when considered cumulatively with the contemporaneous documents, which include the entire correspondences between the second Defendant and the Government authorities support the Plaintiff's claim that he had in fact rendered services required of him to the second Defendant which has a nexus and an inherent causative link to the GSB Project awarded to Gerbang Perdana Sdn Bhd, by the Government of Malaysia in the year 2003 (see Exhibit P-18).
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> This Court finds:
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> i. The Plaintiff was instrumental from the beginning when the proposal for the construction of the original bridge project was awarded in principle through the letter dated 25-06-1998 (Exhibit P-26), as a result of the Plaintiff's services which he had rendered to the second Defendant.
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> ii. The construction of the project known as the GSB Project on a "Design & Built or Turnkey basis" which had subsequently surfaced as the crooked bridge was as a result of the Plaintiff's effort and services which he had rendered to the second Defendant from the beginning and has a causal link arising from the original bridge project.

A iii. The award to Gerbang Perdana Sdn Bhd by the Government of Malaysia in the year of 2003 (Exhibit P-18) (although it was later known as the "crooked bridge" project and contains different set of terms and conditions) has nexus and a causative link to the services provided by the Plaintiff in respect of the original bridge project which did not proceed but later re-surfaced in the year 2003 and converted to the GSB Project.

iv. The services provided by the Plaintiff from the beginning has a causal link to the GSB Project (crooked bridge project) which was awarded to Gerbang Perdana Sdn Bhd ...

[9] There is no cross appeal by the respondent in respect of this finding of the learned judge.

[10] As for the second issue, the learned judge found that the appellant's claim is incompetent under the letter of undertaking as the Bridge Project had been terminated by government. The learned judge's decision is premised on cl. 4 of the letter of undertaking.

Our Grounds Of Decision

[11] The learned judge's reasons for dismissing the claim can be seen in this part of the grounds:

It is important to note that the plaintiff had agreed to refund any payment received if the project was not subsisting and the award is withdrawn or terminated for any reason whatsoever. There, it is untenable as contended by learned lead counsel for the plaintiff that clause 4 should only apply if the award is withdrawn or terminated and not if the project is withdrawn or terminated. Both the award and the project are interrelated or intertwined and must be considered together for the purpose of the services rendered by the plaintiff. The plaintiff's contention cannot be sustained on the facts and in law as the award and project are not independent of one another and either do not exist without the support of the other. The project is an integral and inseparable part of the award and inextricably linked.

54. In the circumstances and for the reason aforesaid, the plaintiff's claim must fail not by reason that it is regarded as opposed to public policy or because the services he had provided previously to the second defendant had no nexus or a causative link to the GSB Project. The plaintiff's claim must fail because the plaintiff had agreed to refund the sum of RM20,000,000.00 or any part

thereof if he had received the said payment or any part thereof on the basis and if the award is withdrawn or terminated which must necessarily include the project itself (for which the award was given) as both the award and the project itself are interrelated and intertwined and is inseparable. Consequently, and as agreed by the plaintiff as contained in said Letter of Undertaking, this court finds that the plaintiff is not entitled to the payment of RM20,000,000.00 upon considering the entire agreement clause which must be read in accordance with the principle by which the contractual documents are to be construed. Both the original bridge project (SIG project) and the GSB project are no longer subsisting as the same did not materialise or having been terminated. The plaintiff himself is estopped from denying the defendants to enforce clause 4 of the said Letter of Undertaking against him.

[12] At this juncture we remind ourselves the established principle of construction of commercial agreements. We can do no better than refer to the what the learned authors in *Chitty on Contracts* vol. I (27th edn.) elegantly state the principle at para. 12-040:

The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself: "One must consider the meaning of the words used, not what one may guess to be the intention of the parties". However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and factual background against which it is made.

[13] In *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37, Lim Beng Choon J said:

I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

[14] With those principles at the foremost of our minds, we now deliberate on the issue at hand. Looking at the words employed in the letter of undertaking, we are in no doubt that the appellant's claim must succeed for the simple reason that it refers to the award of the project as opposed to project itself. Clause 4 specifically states that the letter of undertaking shall remain valid as long as the 'award for the project' remains valid and subsisting. It is our view there is a world of difference between the 'award of the project' and the 'project' itself.

[15] Here it is undisputed at no time was the award of the project terminated or withdrawn by the government. In fact learned counsel for the respondent in his submission confirms this but argued that the letter of undertaking became invalid when the government terminated the by then 'Crooked Bridge Project' in 2006. His contention was accepted by the learned judge and with respect, we cannot agree to that contention as it would mean that the court will be reading something which does not appear within the four corners of the letter of undertaking.

[16] There are three significant elements in the letter of undertaking and they are:

(a) There is a concession by the parties that the respondent had been awarded by the government the Bridge Project on 25 June 1998 through the effort of the appellant (cl. 2);

(b) The date of the letter of undertaking is 3 July 1998; and

(c) The payment due date for the RM20,000,000 is 3 November 1998.

These three elements show conclusively that the parties never intended to refer to the project itself. If they did they would not have specified the payment date a mere four months from the date of letter of undertaking. In any event, if their intention was to refer to the project itself then that could have been achieved by employment of the following words – "this letter of undertaking shall become invalid if and when the project is terminated for whatsoever reasons".

[17] We must also not lose sight of the fact that this commercial transaction is between established and experienced businessmen. They are not the ordinary men in the omnibus so to speak. The court must assume that they can look after themselves and were

fully aware of what they were getting into when they signed this letter of undertaking. It is trite law that courts cannot rewrite contracts. Furthermore commercial contracts of such magnitude, as is this one before us, would only be entered into by parties after seeking best legal and commercial advices. It is thus always the policy of the courts to enforce such agreements to ensure stability and certainty in the trade and commerce in the country. We see no reason in this case to depart from that policy.

[18] In respect of the compensation made by the government for the termination of the Crooked Bridge Project, the learned judge made much of the fact that it was an *ex gratia* payment and there was no unjust enrichment. With respect, this payment is irrelevant to how the letter of undertaking should be interpreted. The law is clear and that is in construing any document, post contract conducts are irrelevant and cannot be taken into account. (see *Wickman Tools v. Schuler AG* [1974] AC 235).

[19] Hence we find merit in appellant's counsel's submission that the learned judge erred in his deliberation when he took into account of the 2006 termination of the project by the government bearing in mind that the letter of undertaking is dated 3 July 1998, the appellant's cause of action commenced on 3 November 1998 (payment date) and date of the claim was 7 July 2002. Had the trial of the case commenced and concluded prior to 2006, the learned judge could not have taken into consideration of the 2006 termination in his deliberation.

Conclusion

[20] For reasons stated above, we allowed the appeal with costs of RM10,000 for each appeal to the respondent and ordered that the deposit to be refunded to the appellant.